VOLUNTARY TRIBUNALS FUNCTIONALLY CONSIDERED.

THE August issue of the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY [1] publishes the revision of the Arbitration Law of the State of New York, making agreements to arbitrate enforceable. The editor states that "the revision was effected after a long campaign by the Chamber of Commerce of the State of New York, assisted by the State Bar Association and various commercial bodies." This followed the action of the New York State Bar Association in formulating its By-law relating to arbitration, adopted January 13, 1917, and compiling a list of the members of the Association who have signified their willingness to act as arbitrators, which list was subsequently published as "The List of Official Arbitrators of the New York State Bar Association." Under the By-law adopted, a Committee on Arbitration was appointed, with power, which was subsequently exercised, to "make all necessary rules and provide forms of submission not inconsistent with existing provisions of law, in pursuance of which a judgment of the Supreme Court may be entered on an award."

The editor of the Journal says: "This overcomes one of the greatest drawbacks to general reliance on arbitration clauses in commercial contracts of all kinds. It puts the State on as sound a footing in this respect as has existed in England under the Arbitration Act since 1889." In this connection, the writer calls attention, without comment, to an existing section of the arbitration statute of Missouri, as follows:

> "Any contract or agreement hereafter entered into containing any clause or provision providing for an adjustment by arbitration shall not preclude any party or beneficiary under such contract or agreement from instituting suit or other legal action on such contract at any time, and the compliance with such clause or provision shall not be a

[1] Pp. 54, 55.

condition precedent to the right to bring or recover in such action." [2]

It may be of value to consider somewhat further the subject of "Voluntary Tribunals", which the writer has advocated for some years past as a democratic ideal in procedure for the adjudication of those private differences between men which ordinarily give rise to what in law are known as civil actions. The method contended for is, I believe, a simple and ordinary step in advance in procedural methods for the adjudication of such differences as are now ordinarily tried in our regularly constituted State and federal courts before judges, elective or appointive, with the aid of juries. The proposed procedure is simply this: that where lawyers are employed by clients to bring about an adjudication of differences which the clients themselves have been unable to compose, these lawyers, instead of resorting to the State courts for the adjudication of such differences, select between themselves a third lawyer of recognized ability, probity and impartiality, and at once proceed to try the issues before this third lawyer so selected, the trial to take place at such time and place, and according to such rules of procedure as the judge thus selected may indicate as best suited to the particular case and to the convenience of the parties and witnesses. As a preliminary to such a submission of their case, the parties to the controversy enter into a written agreement as for a statutory arbitration covering their differences, whereby the award or judgment of the arbitrator or judge thus selected may be filed in the regularly constituted State courts and become a judgment of record which the State stands ready to enforce precisely as it does the judgments of its own regularly constituted courts. The proposed procedure is sufficiently elastic to allow, where deemed advisable, the selection of one or more additional arbitrators, professional or expert laymen, the arbitrators so selected settling all questions of controverted fact and of law involved in the particular controversy.

Thus it is possible for a private difference to be adjudicated strictly according to law, within twenty-four hours after

[2] R. S. Mo., 1909, § 868.

it arises, at a minimum of cost and inconvenience. I have advocated this method for the adjudication of private differences between individuals as a straightforward, self-respecting, conciliatory and strictly scientific legal procedure. I have further contended that while not abating one jot the zeal of the advocate, and not departing in any way from strictly juridical principles, the practice will have a tendency to raise the standard of the bar generally to the level of the judiciary, will tend to promote respect for the law, will encourage independent democratic citizenship, and leave our State courts more free for the adjudication of controversies of a public nature.

It may not be amiss to consider this subject of the reform of legal procedure in its relation to the reform of political and social institutions generally. The writer was impressed with the fact that among the lawyers of this country, who for the past ten years or more have been earnestly engaged in responding to insistent demands—demands which have proceeded from men like President Woodrow Wilson, ex-President William H. Taft, Mr. Moorfield Story of Boston and many other lawyers of prominence—for some radical reform in our court procedure, there was a most marked tendency to over-emphasize the merely mechanical questions involved, with a corresponding neglect of the *functional* questions. Allow me to illustrate: Take the game of baseball or of whist,—you will find that from year to year changes are made in the rules governing these games. The number of fouls or the number of strikes permitted a batter, or the value of the spade as a trump, for instance, is a mere matter of convention, which is subject to change and is changed whenever such change is found to add zest to the game. The rules of a game, as distinguished from the game itself, bear precisely the relation of procedural or adjective law to substantive law. Now in setting about the reform of our administration of justice in this country, we lawyers at once turned our attention to the rules of our game—to devising court rules to take the place of statutory procedure, to liberalizing rules of evidence and rules of pleading, etc.—rather than turning our attention to the function of courts, the function of lawyers and the function of juries.

In precisely the same way, for a number of years past, prac-

tically all the political reforms urged in this country have had reference to political *machinery,* to the ballot, to the constitution of the electorate, to the representation of constituencies in our legislatures, to the question as to whether judges should be elective or appointive, etc., while very little consideration has been given the questions of the *function* of the voter, the *function* of the electorate, the *function* of the legislature, the *function* of our courts. Perhaps the greatest step in political reform taken in the last half century was that which resulted in the Short Ballot movement, which followed the consideration by Mr. Richard S. Childs, in an article, as I recollect, which appeared in the *Outlook* in 1911, of the capacity and *true function* of the voter. "Is it the function of the voter to pick out experts for the administration of our public business?" "Are we not giving the electorate an impossible task when we ask them judiciously to fill our numerous public offices?" Immediately the question of the province, the sphere, the function of the voter was called into question, appeared the utter folly and absurdity of submitting to our vast mixed electorates such questions as: whom shall we have for a Superintendent of Schools, for a clerk of our courts, for a county surveyor, for a State Veterinarian. The bare suggestion from an unknown young man, engaged in a private pursuit, that the voter and the electorate were being required to discharge functions utterly beyond their powers, and which did not truly belong to them, brought daylight where darkness had before prevailed. And singularly enough we have to-day advocates of compulsory voting, under our present system, where the voluntary self-disfranchisement of the ignorant or indifferent, who have no opinion to express on public policies or with respect to candidates, ought to be welcomed, rather than that they should be encouraged to follow the lead of some selfish political boss.

A similar suggestion has been made with reference to the function of our legislatures. Is it the function of our legislature actually *to draft* our statutes, of which we have an ever-increasing and almost deadly number? Ought not such a function to be given to a permanent commission in each jurisdiction in which a legislature functions, such commission to be

accessible to any body of citizens, or to any legislator, and whose special business it shall be to prevent duplications, to draft new laws scientifically and in the light of similar efforts made in other jurisdictions, and leave it to the legislature *to pass upon* the proposed statutes that come through this legislative clearing house? As things now are, in every State we are compelled to have a periodical "revision" of our statutes (in Missouri, every ten years) in order to effect the necessary clearances.

In advocating the adjudication of private differences before Voluntary Tribunals, I have sought to place a similar emphasis on the function of the lawyer, the function of the court, the function of a jury, and the function of the State in its relation to its citizens in the provision of machinery for the settlement of their private differences, as well to consider the responsibility of upright, independent citizens in a democracy who have differences, with respect to their adjudication. Is it speaking too broadly to say: Public courts for public issues, private courts for private issues; to speak of lawyers as peacemakers; to say that whilst popular questions may be submitted to popular juries, scientific questions (and an adjudication according to law is a scientific question) should be submitted to juries composed of experts? May we not rightly say to the democratic citizen: "Stand on your own feet; do not lean up against your already overburdened State; settle your private differences privately."?

The Secretary of the American Judicature Society, a Society formed "to promote the efficient administration of justice", who republished in the December, 1919 issue of the Journel of that Society earlier papers on this subject, in his editorial introducing the subject of "Voluntary Tribunals", says: "Of course such submissions are not to be expected on the part of clients or counsel who seek some special advantage from the delay of the courts, the pitfalls of procedure, or merely hope to worry their opponents. But there must be a considerable proportion of causes, in which both parties honestly seek an adjudication, in which both are to be benefited by promptness and economy of procedure."

To this suggestion, I desire to answer: Honest counsel, who appreciate their functions as ministers of justice, and who desire truly to discharge these functions, will decline to serve or aid clients who seek some special advantage, or who ask at their hands anything other than strict justice according to law. Furthermore, I desire to add that matters of procedure are wholly within the power and province of counsel. Once a cause is committed to an attorney, his client has no legal right to interfere with his procedure. It has already been decided by our courts that in matters of procedure the attorney has authority to bind his client. He can agree to continuances, stipulate as to facts, and agree to a reference or to an arbitration.[3] Statutory Arbitration is part of our recognized legal procedure. The bar of this country needs not the aid of our legislatures, nor the authority of their clients, to adopt the procedure of Voluntary Tribunals. Of course, counsel will always have due regard to the wishes of their clients, will fully explain to them matters of procedure, and in all respects identify themselves with the true interests of their respective clients; but in the last analysis the attorney has the right, and it is his duty, to decline to serve a client who does not leave him free to follow his own judgment in matters of procedure in adjudication. Respect for the law, confidence in the administration of justice, is the *sine qua non* of a democracy. Upon the lawyers of our country more than upon any other class rests the responsibility for securing this.

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[3] See WEEKS, ATTORNEYS AT LAW, Chapter 10.